

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

AMERICAN ITALIAN PASTA COMPANY)	
)	
Opposer,)	Opposition No. 91161373
)	
v.)	
)	
BARILLA G. E R. FRATELLI - SOCIETA)	
PER AZIONI,)	
Applicant.)	

**OPPOSER'S MOTION TO FILE
DEPOSITION TRANSCRIPT AND EXHIBITS UNDER SEAL**

Pursuant to TBMP Rule 703.01(p) and the Protective Order entered in this case, Opposer requests that portions of Timothy Webster's testimonial deposition transcript, and accompanying exhibits, be filed under seal. In particular, Opposer requests that page 9, line 12 through page 11, line 16, page 21, line 18, through page 25, line 1, and page 50, line 12, through page 53, line 6, of the transcript be filed under seal, pursuant to the Protective Ordered herein. Those designations were treated as "Confidential - Trade Secret/Commercially Sensitive" material during the deposition. Attached is a copy of the Webster transcript for public viewing with the identified pages redacted.

Additionally, Exhibits 100, 102, 103 and 104, that were introduced on those identified pages, are also deemed "Confidential - Trade Secret/Commercially Sensitive" under the Protective Order and are filed in an envelope designated "Under Seal." As such, and for convenience of the Board, pages representing redacted Exhibits 100, 102, 103 and 104 are attached hereto.

These pages of testimony and the exhibits identified contain trade secret or other confidential commercial and research information. As such, they have been treated as "Confidential - Trade Secret/Commercially Sensitive" during the course of the proceeding.

WHEREFORE, Opposer respectfully requests that the sensitive portions of Webster's testimonial deposition transcript and Exhibits 100, 102, 103 and 104 be filed under seal.

Date: 12/8/06

Respectfully submitted,



Thomas H. Van Hoozer, Reg. No. 32761

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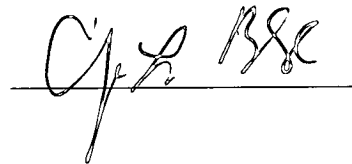
Attorney for Opposer

CERTIFICATE OF MAILING

The undersigned hereby certifies that **OPPOSER'S MOTION TO FILE DEPOSITION TRANSCRIPT AND EXHIBITS UNDER SEAL** was filed via First Class U.S. Mail addressed to:

Trademark Trial and Appeal Board
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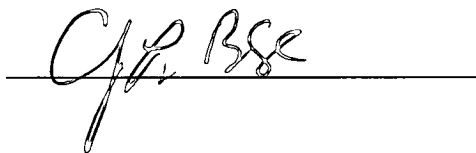
on this 8th day of December, 2006.



CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by overnight mail, postage prepaid, this 8th day of December, 2006, on the following:

G. Franklin Rothwell
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

AMERICAN ITALIAN PASTA
COMPANY,

Applicant,

vs. Opposition No. 91-161,373

BARILLA G. E. R. FRATELLI-
SOCIETA PER AZIONI,

Opposer.

DEPOSITION OF
TIMOTHY SCOTT WEBSTER

November 9, 2006
10:00 a.m.

Hovey Williams LLP
2405 Grand Boulevard
Kansas City, Missouri

Bobbi J. Pyle, Certified Court Reporter for the State of Missouri

APPEARANCES

FOR THE APPLICANT:

ROTHWELL, FIGG, ERNST & MANBECK

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BRYAN CAVE, LLP

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ALSO PRESENT:

MS. KATIE GRAY

STIPULATIONS

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the applicant and counsel for the opposer that this deposition may be taken in stenographic shorthand by Bobbi J. Pyle, Certified Court Reporter, and afterwards reduced into typewriting.

IT IS FURTHER STIPULATED AND AGREED by and between the parties that presentment to the attorneys of record of a copy of this deposition shall be considered submission to the witness for signature pursuant to 703.01(j) -- 37 CFR 2.123(e)(5); but shall in no way be considered as a waiver of the witness's signature, to be signed by the witness at any time before or at the trial of this case, and if not signed by the time of trial it may be used as if signed.

IT IS FURTHER STIPULATED AND AGREED between counsel for the respective parties hereto that the deposition of the witness may be signed before a notary public.

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1 Deposition of Timothy Scott Webster

2 November 9, 2006

3 PROCEEDINGS

4 (The proceedings began at 10:00
5 a.m.)

6 (Deposition Exhibits-98&99 were
7 marked by Mr. Van Hoozer for identification.)

8 TIMOTHY SCOTT WEBSTER, of lawful
9 age, being first duly sworn to tell the
10 truth, the whole truth, and nothing but the
11 truth, deposes and says on behalf of the
12 opposer, as follows:

13 THE REPORTER: Do you solemnly
14 swear that the testimony you are about to
15 give in the cause pending will be the truth,
16 the whole truth, and nothing but the truth?

17 THE WITNESS: I do.

18 DIRECT EXAMINATION

19 BY-MR.VAN-HOOZER:

20 Q. Would you please state your full
21 name for the record?

22 A. Timothy Scott Webster.

23 Q. Mr. Webster, I'm going to show you
24 what's been marked as Exhibits 98 and 99.
25 I'll represent that Exhibit 98 is the notice

1 to take your deposition and Exhibit 99 is the
2 subpoena. Did you receive Exhibit 99?

3 A. Yes.

4 Q. Okay. And are you appearing
5 pursuant to the subpoena issued in Exhibit
6 99?

7 A. Yes.

8 Q. Have you had your deposition taken
9 previously?

10 A. Yes.

11 Q. I'm going to give you a few
12 instructions. First of all, if you don't
13 understand a question, you can have inquirer
14 repeat it. If you need a break for any
15 reason, please let us know and we'll take a
16 recess.

17 And, finally, please make all your
18 responses audible so that the court reporter
19 may record your answer.

20 Are you represented by counsel here
21 today?

22 A. Yes.

23 Q. Okay. And for the record, could
24 you just identify counsel's name?

25 MR. JAVILLONAR: Christopher C.

1 Javillonar, attorney for Mr. Webster.

2 Q. (By Mr. Van Hoozer) Mr. Webster,
3 could you please state your education
4 following high school?

5 A. Bachelor's of business
6 administration from Drake University.

7 Q. Do you hold any certificates or
8 degrees in addition to your bachelor's degree?

9 A. I was a certified public accountant
10 following college.

11 Q. Are you currently employed?

12 A. I'm self-employed.

13 Q. Okay. Have you been previous
14 employed by American Italian Pasta Company?

15 A. Yes.

16 Q. During what period?

17 A. April of 1989 through December of
18 2005.

19 Q. What positions or titles did you
20 hold with American Italian Pasta Company?

21 A. Chief financial officer, chief
22 operating officer, president, chief executive
23 officer, and director.

24 Q. And during what period of time did
25 you hold the position of president?

1 A. June, 1991, through December of
2 2005.

3 Q. And with regard to the position of
4 chief executive officer, during what period
5 did you hold--

6 A. 1992 through December, 2005.

7 Q. During your tenure as president and
8 chief executive officer at AIPC when those
9 were commensurate, what were your duties and
10 responsibilities with the company?

11 A. General management of the company.

12 Q. Okay. And during your tenure at
13 AIPC, what was the business of the company?

14 A. Manufacturing, marketing, and
15 distribution of dried pasta products.

16 Q. Were there different business
17 focuses within the business of manufacturing,
18 marketing, and selling pasta carried on by
19 the company?

20 A. Yes.

21 Q. And what were those different
22 business segments or focuses?

23 A. The business was serving multiple
24 customer segments, retail with branded and
25 private label products, institutional markets,

1 food service and industrial, and a limited
2 amount of export.

3 Q. Did the company have a controlled
4 brand segment?

5 A. Yes, within those--

6 Q. What is meant by that?

7 A. Within the retail customer base, we
8 would sell our own brands.

9 We would sell private labels, which
10 would be the customers' brand and,
11 occasionally, we would develop a control brand
12 for a customer which would typically be a
13 exclusive right to distribute and market that
14 brand to the consumer.

15 Q. Now, during the period prior to
16 1997, did AIPC own any of its own brands for
17 pasta?

18 A. Yes.

19 Q. And what were those brands?

20 A. Pasta La Bella and a number of
21 these small control labels.

22 Q. What plants was American Italian
23 Pasta Company operating for the manufacture of
24 pasta back in 1997?

25 A. A plant in Excelsior Springs,

1 Missouri, and a plant in Columbia, South
2 Carolina.

3 Q. Did AIPC have any business
4 opportunities come to it in 1997 in the area
5 of branded pasta?

6 A. Yes.

7 MR. VAN HOOZER: I want to
8 designate this portion of the record
9 confidential, attorneys' eyes only.

10 (Deposition Exhibit-100 was marked
11 by Mr. Van Hoozer for identification.)
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17 MR. VAN HOOZER: We can go back
18 to a non-confidential portion of the record
19 again.

20 Q. (By Mr. Van Hoozer) After AIPC
21 entered into the agreement marked Exhibit 100
22 with Best Foods, did you see the packaging
23 then in use by Best Foods for its Mueller's
24 brand pasta?

25 A. Yes.

1 Q. Let me show you what's been
2 previously marked Exhibit 48.

3 MR. VAN HOOZER: Let's go off the
4 record for just a second.

5 (A discussion was held off the
6 record.)

7 MR. VAN HOOZER: Back on the
8 record.

9 Q. (By Mr. Van Hoozer) Looking at
10 Exhibit 48, have you seen this packaging or
11 packaging similar to it before?

12 A. Yes, sir.

13 Q. Okay. Can you describe the
14 appearance of the packaging for the Mueller's
15 pasta products at the time AIPC -- or just
16 before the time AIPC began its manufacturing
17 activities for Best Foods?

18 A. Consistent with the exhibit,
19 basically a white box, red Mueller's brand
20 identity, "America's Favorite Pasta"
21 prominently displayed.

22 As part of the manufacturing
23 agreement, we made a number of mechanical,
24 physical adjustments to the package to fit on
25 highly automated machinery in our facilities.

1 But the basic design, as I recall
2 it, is consistent with what we have here on
3 this exhibit.

4 Q. And when American Italian Pasta
5 began to manufacture the pasta on behalf of
6 Best Foods, was that initially an exclusive
7 arrangement or was there a transitional
8 period?

9 A. There was a transition period.

10 Q. And when was that?

11 A. I believe the agreement was signed
12 in April of -- let me get it here.

13 MR. BANNER: It's on Page 49.

14 A. 15th of April, 1997. And over the
15 pursuing months, CPC wound down the activity
16 and their manufacturing in New Jersey and the
17 volume was transitioned into our facilities at
18 the time we were expanding the South Carolina
19 facility to dramatically increase its capacity
20 to bring in this very significant amount of
21 volume.

22 Q. (By Mr. Van Hoozer) I won't make
23 you hold onto that. We'll set that down.

24 THE WITNESS: Counsel, are we
25 leaving this one behind?

1 MR. VAN HOOZER: It's been marked,
2 but we won't make you hold onto that one
3 either.

4 (Deposition Exhibit-101 was marked
5 by Mr. Van Hoozer for identification.)

6 Q. (By Mr. Van Hoozer) Let me show
7 you what's been marked as Exhibit 101 and ask
8 you if you recognize that?

9 A. Yes, I do.

10 Q. And what is Exhibit 101?

11 A. It's a letter to me from Tom
12 Berkle, who was the administrative and
13 financial liaison during the transition period.

14 He had been one of the leaders of
15 the due diligence team that was involved in
16 the decision to move the manufacturing from
17 their own facility to our operations.

18 And this letter described that
19 process of evaluation and the reason that
20 AIPC was chosen.

21 Q. Now, I see that Exhibit 101 is
22 dated September 11, 1997.

23 Did you receive that exhibit
24 roughly at about that time?

25 A. Yes, sir.

1 Q. What effect on AIPC sales and
2 volume did the Mueller's work have for
3 American Italian Pasta Company?

4 A. It was a dramatic increase in our
5 business activity.

6 As I recall, it was in the
7 neighborhood of a 60 to 66 percent increase
8 in our manufacturing volume.

9 Q. As the president of the American
10 Italian Pasta Company, what level of attention
11 did you devote to ensuring that you could
12 meet the requirements for producing and
13 packaging Mueller's pasta in accordance with
14 the agreement which is Exhibit 100?

15 A. It was the largest and most
16 important initiative the company undertook at
17 that point, so it was certainly something
18 that I spent a lot of time and energy on.

19 Q. During the change-over from the
20 manufacture of the Mueller's pasta at the New
21 Jersey facility of Best Foods to the American
22 Italian Pasta Company factories, you mentioned
23 some technical changes to the boxes. Could
24 you elaborate on that, please?

25 A. These changes, Tom, were primarily

1 dimensions.

2 The packaging machines that Best
3 Foods utilities were decades old and newer
4 technology had come along to make that
5 process much more efficient.

6 And as part of deploying that
7 technology, adjustments had to be made to the
8 dimensions of the package, height and
9 footprint, to facilitate them being moved to
10 our mechanical processes.

11 I also recall that a formulation
12 change was made to embrace our 100 percent
13 semolina formulation and the package was
14 modified to reflect that raw material change
15 where Mueller's had historically used a
16 combination of farina and semolina in their
17 products.

18 Q. Otherwise, referring to Exhibit 48,
19 do you recall any other changes that were
20 necessary to the packaging as incident to
21 AIPC's--

22 A. No, I--

23 Q. --products?

24 A. I remember the design remaining
25 relatively constant.

1 Q. Mr. Webster, let me show you
2 what's been previously marked as Exhibits 9
3 and 56 and ask you if you recognize those?

4 A. Yes.

5 Q. Do you recall what Exhibits 9 and
6 56 might be?

7 A. Yes, they are a subset of the
8 Mueller brand.

9 They designated certain shapes to
10 be Italian style shapes, like, fettuccine,
11 penne rigate and other more unique Italian
12 oriented shapes and those were color coded
13 with green, still maintaining the white and
14 red and the "America's Favorite Pasta," but
15 differentiating within the family through the
16 addition of the green color replacing the
17 blue on the previous exhibit.

18 Q. Similarly let me show you what has
19 been previously marked as Exhibits 42 and 55
20 and ask you if you can identify those?

21 A. Similar to the prior example within
22 the Mueller's family, there were subsets that
23 were either shape or formula specific in the
24 instance of this orange or pumpkin color it
25 was products that were -- we referred to as

1 tri-color, which involves red, white, and
2 green pasta, the red including tomato powder,
3 the green pasta including spinach powder as
4 an ingredient.

5 And in this family, there were
6 four or five shapes of tri-color pasta still
7 within the Mueller family, still under the
8 "America's Favorite Pasta" mark with the
9 tri-color subset.

10 Q. And then let me show you what has
11 been marked as Exhibits 54 and 47 and ask
12 you if you recognize those?

13 A. Yes, sir. Similarly, another
14 subset of the Mueller's "America's Favorite
15 Pasta" mark and trade dress. These were
16 quick-cooking products.

17 The first one you handed me is
18 pasta quick, which was a thin-walled quick
19 cooking pasta.

20 Q. And that's Exhibit 54?

21 A. Yes, sir.

22 Q. Okay.

23 A. And the Exhibit 47 refers to
24 micro-quick, which was a product that was
25 developed to be microwavable still under this

1 quick-cooking positioning and theme.

2 So pasta quick and micro-quick
3 were, again, subsets of the Mueller's
4 "America's Favorite Pasta" brand and mark and
5 trade dress.

6 Q. Mr. Webster, I want to go back to
7 what I'd previously shown you and marked as
8 Exhibit 9 and -- I'm sorry, Exhibit 48 and
9 Exhibit 57, and ask you to look at those two
10 exhibits and tell me, first of all, if you
11 recognize Exhibit 57.

12 A. Yes.

13 Q. Okay. And then what's the
14 relationship between Exhibits 48 and 57?

15 A. They both are the ready-cut shape,
16 which was a tubular pasta similar to ziti or
17 penne rigate's straight cut as opposed to an
18 angle cut.

19 Exhibit 48 is a 16-ounce package
20 of that product.

21 Exhibit 57 is an 8-ounce or
22 smaller version of that product. And there
23 are some design evolutions in this.

24 I cannot be helpful as to the
25 specific timing or chronology, but, again,

1 both consistent with the overall Mueller's
2 "America's Favorite Pasta" positioning or what
3 we called core cuts, which were the more
4 value-oriented products, which were always in
5 the red, white, and blue color motif.

6 Q. Consistent -- and let me ask you
7 if there was any consistency that was
8 maintained during this Best Foods manufacturing
9 period or the package designs that you were
10 procuring and producing for Best Foods and
11 refer to the exhibits that we put out in
12 front, 47, 55, 9, 56.

13 A. This may be redundant with some of
14 my prior comments, but the common elements
15 are the red stripes across all color schemes
16 and subsets, the Mueller's brand imagery with
17 the wheat behind it, the "America's Favorite
18 Pasta" with made with or made from semolina
19 as part of it, the top and bottom carton
20 flaps, including Mueller's and the product
21 descriptor.

22 So there were a number of common
23 elements across the family.

24 The points of difference as
25 described earlier were related either to shape

1 or formulation.

2 The branding and trade dress around
3 Mueller's and "America's Favorite Pasta" were
4 consistently maintained across all of the
5 products.

6 Q. Did anything transpire in November
7 of 2000 which affected your manufacture of
8 Mueller's pasta?

9 A. Yes. Around that time, we
10 acquired the brand from CPC/Best Foods.

11 MR. BANNER: I assume this is
12 confidential?

13 MR. VAN HOOZER: Yes. We are
14 going back on a confidential portion of the
15 record at this point.

16 (Deposition Exhibit-102 was marked
17 by Mr. Van Hoozer for identification.)

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2 MR. VAN HOOZER: We can go back
3 to the non-confidential portion of the record.

4 Q. (By Mr. Van Hoozer) In
5 preparation for American Italian Pasta's entry
6 into the brand asset purchase agreement for
7 Mueller's brand product line in October of
8 2000, did AIPC do any investigation of the
9 marketing previously conducted by Best Foods
10 under the Mueller's brand?

11 A. Yes. We met with the brand
12 manager and the trade marketing group to
13 review promotional plans, marketing plans and
14 things implemented and things considered for
15 implementation for the brand.

16 Q. Mr. Webster, let me show you
17 what's been marked as Exhibit 61 and ask if
18 you can identify that?

19 A. Yes. This is a promotional event
20 that was done for the Mueller brand that
21 involved selling two 8-ounce boxes of
22 Mueller's "America's Favorite Pasta" inside a
23 Tupperware container.

24 And that was done to increase
25 sales of the brand and to create some

1 secondary distribution for the product.

2 Q. Did that create some manufacturing
3 challenges for AIPC?

4 A. Yes, yes, indeed.

5 Q. Were you aware of any couponing
6 that was taking place with regard to
7 Mueller's products?

8 A. Yes. Pasta is a very
9 promotion-driven category and price promotions
10 and coupons, as an example, were a frequent
11 part of our marketing.

12 Q. Let me show you what's been marked
13 as Exhibit 66.

14 Were you familiar with any of the
15 couponing activities that had taken place by
16 Best Foods prior to your acquisition of the
17 Mueller's brand?

18 A. Yes. We were regularly copied on
19 examples of their marketing activity, which
20 included this type of coupon and ad activity.

21 Q. What other types of advertising and
22 promotion was conducted by Best Foods during
23 the time immediately preceding the acquisition
24 by American Italian Pasta Company of the
25 Mueller's brand?

1 A. This stretches my memory, but
2 directionally the majority of the marketing
3 activity was price and promotion related, but
4 I know there were examples of periodic
5 radio-, television-type advertising around the
6 brand.

7 Q. During your tenure at American
8 Italian Pasta Company, what was the geographic
9 scope of sales of the Mueller's brand of
10 pasta?

11 A. Mueller's was distributed broadly
12 through grocers in the eastern half of the
13 United States.

14 We also had less-dense distribution
15 through the military channel that would have
16 had a broader U.S. coverage.

17 Periodically, customers would take
18 Mueller's volume into other geography on
19 promotional events or what we would call
20 in-and-out-type of promotions, where we would
21 come up with something like the Tupperware
22 previously mentioned that customers that didn't
23 carry the brand every day might bring the
24 brand into their stores in that geography.

25 Additionally, the brand had an

1 export business that was primarily concentrated
2 in the Caribbean.

3 Q. Once American Italian Pasta Company
4 acquired the Mueller's brand, did AIPC assume
5 responsibility for marketing Mueller's pasta
6 products?

7 A. Yes, sir.

8 Q. And were there any changes to the
9 packaging of the Mueller's products?

10 A. The packaging evolved over time and
11 certain elements were held constant and, in
12 particular I recall that maybe a year after
13 we acquired the brand, we experimented with
14 taking the what were referred to by Mueller's
15 previously as the Italian cuts, we actually
16 took them to Italy and had them made in our
17 new facility in Italy.

18 And as part of that, we changed
19 the package to a blue base color on those
20 items.

21 We introduced a sub-brand Pasta La
22 Bella.

23 We introduced the "Made in Italy"
24 both legal and marketing descriptors around
25 that product, which was a sub-set of the

1 brand of shapes that Mueller -- of the brand
2 in shapes that Mueller had historically not
3 performed very well and had a very low
4 penetration rate with the consumer.

5 That experiment did not bear fruit
6 and in our research with the consumer around
7 why it didn't work, we found that the essence
8 of the Mueller brand was the white box, it
9 was the red, white, and blue, it was the
10 Americana of the brand, the American-ness of
11 the brand.

12 And central to that in our view
13 and in the consumer's view was the "America's
14 Favorite Pasta" element of our branding and
15 trade dress.

16 (Deposition Exhibit-105 was marked
17 by Mr. Van Hoozer for identification.)

18 Q. (By Mr. Van Hoozer) Mr. Webster,
19 let me show you what's been marked as Exhibit
20 105. Can you tell me what Exhibit 105
21 represents?

22 A. It is a joint presentation
23 developed both by the company and Crossmark
24 who is our retail broker that assisted us in
25 the execution of planograms.

1 Planograms are the shelf design and
2 preferred placement of how our products would
3 appear on a shelf.

4 And this is an example that
5 Crossmark and the company developed as a
6 prototype of how our products would be
7 merchandise on a shelf.

8 And in it, you see the development
9 that I described where a portion of the
10 Mueller brand was moved into blue boxes and
11 vertical bags from our Italian facility while
12 on the left some of the real core volume
13 items, which we called core cuts, Best Foods
14 had called cross-category cuts, items like
15 spaghetti, thin spaghetti, elbow macaroni, and
16 ready-cut, which were the roughly half of the
17 brand's volume. Even more were maintained in
18 the white "America's Favorite Pasta" trade
19 dress.

20 MR. VAN HOOZER: And just for the
21 record, I want to clarify, we no longer
22 regard this as confidential counsel, only I
23 think its time has long since come and gone.

24 MR. BANNER: Thanks.

25 (Deposition Exhibits-106THRU110 were

1 marked by Mr. Van Hoozer for identification.)

2 Q. (By Mr. Van Hoozer) Mr. Webster,
3 let me show you what I've marked as Exhibit
4 106, Exhibit 107, 108, 109, 110.

5 I don't see any -- I skipped one.
6 So we have got to go back and put 111.

7 (Deposition Exhibit-111 was marked
8 by Mr. Van Hoozer for identification.)

9 Q. (By Mr. Van Hoozer) 111 is Bates
10 No. A05020.

11 Mr. Webster, do you recognize those
12 exhibits?

13 A. Yes. They are all one-pound boxes
14 of Mueller's spaghetti in slightly evolutionary
15 packaging.

16 Q. Could you, for the record, give us
17 in order, to the best of your recollection,
18 and I know I've handed you one, funny
19 location, as to how the Mueller's one-pound
20 spaghetti packaging has evolved?

21 A. Okay. My best estimate would be
22 that the sequence is 106, 107, 111, 108, and
23 111 and 108 are very similar, and I could
24 have that sequence wrong. Then 109 and then
25 110.

1 You see the design evolving over
2 time, but the core elements of Mueller's and
3 " America's Favorite Pasta" are continuous
4 throughout.

5 Q. Let me ask you about Exhibit 107
6 followed by Exhibit 111.

7 Now, Exhibit 107, I see the Best
8 Foods logo; is that correct?

9 A. In 107--

10 Q. I'm sorry, the AIPC logo.

11 A. Yes, you see distributed by
12 American Italian Pasta Company.

13 Q. And compare that to Exhibit 106,
14 do you see any indication for American
15 Italian Pasta Company?

16 A. No, this is distributed by Best
17 Foods and Mueller's is a registered trademark
18 of CPC, International at that time.

19 Q. Okay. What was the brand image
20 you wanted to convey with the Mueller's core
21 line of product?

22 A. The essence of Americana of pasta
23 made and eaten the American way. And
24 certainly our descriptor of it being
25 "America's Favorite Pasta" was consistent with

1 that.

2 Q. Mr. Webster, after AIPC's
3 experiment with the Mueller's Pasta La Bella,
4 did AIPC come to any realizations about the
5 importance of the Mueller's brand essence?

6 A. Yes. In ending that experiment,
7 we returned all of the packing to the white
8 background.

9 We re turned all of the product to
10 the Mueller's brand, eliminating the sub-brand
11 Pasta La Bella.

12 We returned the "America's Favorite
13 Pasta" to all -- maintained it on all
14 packages, including in the aftermath of that
15 experience, the "America's Favorite" mark or
16 trade dress was refined and enhanced, in our
17 view, by adding the elements of the American
18 flag as part of the "America's Favorite
19 Pasta" image and design.

20 Q. Mr. Webster, I'm going to show you
21 what have previously been marked as Exhibits
22 10 through 40 and ask you to take a look at
23 those.

24 A. (Witness complied.) Is the
25 sequence important?

1 Q. No.

2 A. Okay.

3 Q. Mr. Webster, do you recognize
4 Exhibits 10 through 40?

5 A. Yes. They are all examples of
6 Mueller's "America's Favorite Pasta" packaging.

7 Q. And was that Mueller's "America's
8 Favorite Pasta" packaging adopted over what
9 scope of products of American Italian Pasta
10 Company, Mueller's brand?

11 A. Following the experiment with
12 Mueller's Pasta La Bella, it was across all
13 of the Mueller's products.

14 Q. You mentioned previously the flag
15 or pennant design adjacent to "America's
16 Favorite Pasta." Why was that selected?

17 A. As mentioned a few minutes ago, in
18 communication with consumers and refining the
19 strength of the Americana positioning and the
20 clarity of Mueller's as "America's Favorite
21 Pasta, " both to better and more clearly
22 define the definition of Mueller's, but also
23 to allow us to contrast ourselves with
24 certain competitors that were gaining ground
25 in the marketplace.

1 Q. And within the scope of American
2 Italian Pasta's business, did you consider
3 that there was a difference between pasta and
4 noodles for AIPC's own internal purposes?

5 A. Yes.

6 Q. And what was that difference?

7 A. Noodles are pasta products that
8 have egg in them, either egg or egg white,
9 which is typically a usage-related subset of
10 the products for casseroles and soups and the
11 like.

12 And noodles were an important part
13 of the Mueller's brand. It was a big volume
14 and an important part of the "America's
15 Favorite Pasta" line-up.

16 Q. During your tenure, did AIPC use
17 any slogan on its noodles comparable to
18 "America's Favorite Pasta"?

19 A. Yes, I believe we added the
20 "America's Favorite Noodle" at some point to
21 the noodle packaging.

22 Q. After the adoption of the flag-type
23 packaging in Exhibits 10 through 40, did AIPC
24 engage in any marketing or promotional
25 activities for its Mueller's branded pasta?

1 A. Yes, it was our largest brand and
2 we supported it within the financial plans
3 and limits with promotion and advertising.

4 Q. Let me show you what's been
5 previously marked Exhibit 71. Can you tell
6 me what that document represents?

7 A. I believe it is a page from our
8 web site and the Mueller's branded web site,
9 in particular, which in the upper left-hand
10 corner flags Mueller's "America's Favorite
11 Pasta" and is the home page introducing
12 recipes, frequently asked questions, and some
13 promotional work we did with Rachael Ray that
14 led to some advertising spending and some
15 specific promotional events and P.R.

16 Q. Next, let me show you what's been
17 previously marked as Exhibit 62.

18 You mentioned Rachael Ray. What's
19 Exhibit 62?

20 A. It is a recipe card. Does this
21 refer to the entire packet or just the first
22 page?

23 Q. Maybe you could categorize the
24 entire packet and maybe break that down--

25 A. Sure.

1 Q. --if that's convenient.

2 A. Sure. The first page of Exhibit
3 62 is a promotional recipe card developed
4 with Rachael Ray, which was used to promote
5 the brand and the -- some quick, 30-minute
6 meal recipes that she designed specifically
7 for the brand.

8 Second page is a free-standing
9 insert or FSI, which was developed to further
10 promote the tie-in with Rachael Ray and the
11 recipe development, as well as offering a
12 price discount or coupon on the Mueller
13 brand.

14 Item -- Page 3 of that is a
15 promotional card which highlighted an aspect
16 of the package design called "Create a Meal,"
17 which encouraged consumers to mix and match
18 sauces, vegetables, and meats to create dozens
19 of usage options.

20 And Page 4 is another free-standing
21 insert, which promotes the brand with the
22 package prominently displayed at a web site
23 we developed called "Makes a Meal," which
24 allowed consumers to go to that web-specific
25 and download recipes, but also create their

1 own recipes on kind of an interactive
2 marketing system.

3 Q. Let me show you what's been marked
4 as Exhibit 52. Can you identify Exhibit 52?

5 A. Yes. It is also an example of a
6 free-standing insert.

7 In fact, I think it's the same one
8 as Page 4 of the prior exhibit with a
9 different price point. So geographically we
10 would use different price points on these
11 coupons.

12 So the date is the same on the
13 two, so this is another example of a
14 free-standing insert used to communicate the
15 brand, promote the brand, and offer the
16 consumer a price off reduction or promotional
17 discount through the vehicle of a coupon.

18 Q. Did AIPC do any media advertising
19 for America's Favorite Pasta? I'm sorry, for
20 Mueller's pasta.

21 A. Our advertising budgets were
22 comparatively modest to many bigger brands,
23 but we did some level of television and print
24 and radio advertising in support of the
25 brand.

1 (Deposition Exhibits-112&113&114
2 were marked by Mr. Van Hoozer for
3 identification.)

4 Q. (By Mr. Van Hoozer) Mr. Webster,
5 let me show you what I've just marked as
6 Exhibits 112, 113, and 114.

7 Would these be documents that
8 you've previously seen?

9 A. Likely would have seen documents
10 like this which track our media spending
11 behind the brand.

12 Q. Does that indicate AIPC conducted
13 any media advertising for the Mueller's brand?

14 A. Correct. These are examples in
15 113 and 114 of what we would call print ads
16 which were magazine ads that were purchased
17 to promote the brand.

18 And 112 is an example of
19 television advertising spending being tracked
20 by this organization.

21 And 112 is an example of
22 television advertising spending being tracked
23 by this organization.

24 Q. In your experience, was television
25 advertising a very successful vehicle for

1 promoting pasta products?

2 A. Not for our company. The price
3 tag and there related impact on the business
4 didn't seem to be fruitful, so our efforts
5 were more around promotional print activities.

6 Q. And what are trade promotion
7 activities?

8 A. Primarily offering the consumer the
9 opportunity to buy the product at a
10 discounted price with an in-store circular ad
11 or a newspaper ad and a secondary placement
12 within the store, either an end-aisle display
13 or these types of things where the types of
14 promotional events that we were looking for.

15 Q. Are you familiar with the term
16 "slotting"?

17 A. Yes.

18 Q. And did AIPC expend any moneys for
19 slotting with respect to Mueller's products?

20 A. Yes. Any time a new item was
21 developed or a new geography or a new
22 customer were added, you typically paid
23 slotting dollars to get your product on the
24 shelf.

25 And the cousin company spent

1 hundreds of thousands of dollars and millions
2 of dollars in its lifetime putting products
3 on the shelf.

4 Q. During the time that you were
5 involved with the Mueller's pasta business on
6 behalf of American Italian Pasta Company, did
7 you have any sense of what consumers or how
8 consumers regarded the phrase "America's
9 Favorite Pasta"?

10 A. Yes, we did consumer research
11 periodically, from time to time, to assess
12 the brand's progress, its awareness in the
13 consumer's mind, the importance of elements,
14 and we believed and were validated that it
15 was an important part of the way the consumer
16 viewed Mueller's.

17 Q. Mr. Webster, let me show you
18 what's been previously marked as Exhibit 85
19 and 86.

20 MR. VAN HOOZER: Off the record.

21 (A discussion was held off the
22 record.)

23 Q. (By Mr. Van Hoozer) Do you
24 recognize your signature on any pages of
25 those documents?

1 A. Yes.

2 Q. And what are -- Do you remember
3 what Exhibits 85 and 86 concern?

4 A. I believe they are trademark
5 applications related to "America's Favorite
6 Pasta".

7 Q. Do you recall proceeding with
8 attempting to register the "America's Favorite
9 Pasta" for AIPC?

10 A. Yes, sir.

11 Q. And when did that occur?

12 A. In 2003, March.

13 Q. Around that same time frame, were
14 you involved in a litigation concerning the
15 use of "America's Favorite Pasta" with New
16 World Pasta?

17 A. Yes, we were.

18 Q. Okay.

19 A. It had just completed.

20 Q. Do you recall why you decided to
21 proceed with these two applications to
22 register "America's Favorite Pasta" as a
23 trademark?

24 A. We had spent an enormous sum, by
25 my measure, on the company's behalf defending

1 and protecting the mark and the ability to
2 use the mark.

3 And this was just a logical next
4 step to further enhance our position.

5 Q. Did you authorize the institution
6 of this opposition against Barilla's
7 application to register the mark, "Barilla,
8 America's Favorite Pasta"?

9 A. Yes, sir.

10 Q. What were some of the reasons that
11 you wanted to oppose that trademark
12 application?

13 A. We believed that it was an
14 integral and important part of the Mueller's
15 brand and trade dress and identity and
16 consumer connection. And we thought it was
17 of value. We thought it was important.

18 We thought it was a point of
19 difference with Barilla, which offered itself
20 up as " Italy's No. 1" pasta on its
21 packages, even though they came from Iowa.

22 And we felt it was an important
23 part of Mueller's and it was an important
24 point of differentiation from Barilla, which
25 clearly stood for Italy's No. 1 pasta.

1 Q. Do you have any estimate about how
2 many packages of Mueller's pasta bearing the
3 mark "America's Favorite Pasta" were made or
4 distributed by AIPC during the time that you
5 were with AIPC?

6 A. Hundreds and hundreds of millions,
7 probably over a billion pounds.

8 Q. Was there any time during your
9 tenure with American Italian Pasta when
10 Mueller's pasta was produced and packaged and
11 was not sold with the slogan "America's
12 Favorite Pasta" appearing on the package?

13 A. Can you clarify the time of your
14 question during my tenure?

15 Q. During the time when AIPC was
16 producing that product for Best Foods and the
17 time it was printed on the brand.

18 A. No, it would have been in
19 continuous use.

20 MR. VAN HOOZER: I have no further
21 questions.

22 MR. BANNER: Do you want to take
23 a break?

24 MR. VAN HOOZER: Sure.

25 (A break was taken.)

1 (The parties returned to the
2 deposition and the following proceedings were
3 had:)

4 MR. VAN HOOZER: Back on the
5 record before Mr. Banner begins. I would
6 like to go ahead and move for the admission
7 of Exhibits 98 through 114.

8 MR. BANNER: No objection.

9 MR. VAN HOOZER: Okay. Your
10 witness.

11 MR. BANNER: Thank you.

12 CROSS-EXAMINATION

13 BY-MR.BANNER:

14 Q. Mr. Webster, I'm the fourth or
15 fifth attorney in this case and so I need to
16 ask you some questions because I wasn't here
17 at the beginning.

18 To start, I wanted to ask you
19 about your declaration of March of this year.

20 Do you recognize that? I'm not
21 going to move it for introduction, I just
22 want to talk about it.

23 A. Yes, sir.

24 Q. And in this case, the issue is
25 really Barilla's right to register "Barilla is

1 America's Favorite Pasta."

2 Where are your offices -- where
3 were your offices between the time you were
4 president of AIPC to the time you left AIPC?

5 A. Either in Excelsior Springs,
6 Missouri, or in Kansas City, Missouri.

7 Q. Are you currently a consultant or
8 employee of AIPC?

9 A. I am no longer an employee of the
10 company.

11 Q. You testified that Best Foods used
12 "America's Favorite Pasta" with Mueller's brand
13 from the time you came to AIPC or even
14 before that, to your knowledge?

15 A. That's not a correct
16 characterization.

17 Q. Okay.

18 A. I started with AIPC in April of
19 1989. The interaction with Best Foods began
20 prior -- in late 1996, culminating in the
21 signing of the manufacturing and distribution
22 agreement in April of 1997.

23 And it is around that time that I
24 began to focus on and become more familiar
25 with Mueller's packaging, branding, et cetera.

1 Q. And at that time, you recall from
2 the exhibits that Best foods was using
3 "America's Favorite Pasta"?

4 A. Correct.

5 Q. And do you have any knowledge of
6 what Best Foods was using -- Was the logo
7 "America's Favorite Pasta" in use in 1990, to
8 your knowledge?

9 A. I don't know that specifically.

10 Q. How about in 1995, to your
11 knowledge?

12 A. I don't know the answer to that.

13 Q. If you will look at the
14 declaration, I think it's three pages, the
15 March, 2006, declaration in front of you.

16 Is there anything you would change
17 to that?

18 A. No.

19 Q. Can you take a look at the --
20 that declaration goes back to another
21 declaration you made in the court case that
22 you filed against New World Pasta. Do you
23 remember that?

24 A. Yes, sir.

25 Q. Do you want to take a couple of

1 minutes to take a look at that declaration?

2 A. Sure. (Witness complied.)

3 Q. It's in there. It's the second
4 one back.

5 I just want to know if there are
6 any changes you want to make in that
7 declaration. It's been four years, so--

8 A. No new developments.

9 Q. Okay. I'm glad to hear it.

10 And are those the exhibits that
11 appeared in that declaration when it was
12 filed in court, to the best of your
13 knowledge?

14 A. To the best of my knowledge.

15 MR. JAVILLONAR: Just for
16 clarification, the second document is an
17 affidavit as opposed to a declaration.

18 MR. BANNER: I'm sorry. You're
19 right. Affidavit.

20 Q. (By Mr. Banner) Today we saw the
21 acid purchase agreement that AIPC executed
22 with Best Foods. And that is Exhibit 100.
23 Did you personally negotiate this acid
24 purchase agreement?

25 A. I was a part of the team that

1 negotiated the agreement.

2 Q. In your opinion, was Best foods
3 giving anything away in this agreement, in
4 this negotiation?

5 Were they trying to get out of the
6 pasta business, in your opinion?

7 MR. JAVILLONAR: I'm going to
8 object to it as it calls for my client to
9 speculate as to what Best Foods was thinking.
10 Subject to that objection, if you know.

11 A. I don't know what their mindset
12 was.

13 Q. (By Mr. Banner) Okay. With whom
14 -- you introduced a letter from the team
15 leader of the negotiations.

16 Do you remember that letter that
17 you introduced today?

18 A. Yes, sir, Exhibit 101.

19 Q. Okay. And he was the person that
20 was representing Best Foods in the
21 negotiations primarily?

22 A. He was one of several players on
23 their team negotiating.

24 Q. And under the terms of this
25 manufacturing and distribution agreement, you

1 received instructions from Best Foods on how
2 to print the packaging?

3 A. They gave us artwork to follow in
4 procuring the packaging.

5 Q. I think you have already answered
6 this. All the stuff that was made during
7 this contract was made either in Excelsior
8 Springs, Missouri, or in South Carolina, all
9 the pasta?

10 A. Everything we made for them,
11 correct.

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7 Q. After you purchased the Mueller's
8 product line in 2000, did you sell to that
9 entity that CPC had formally sent to you for
10 military installations?

11 A. I know we sold into the military
12 commissaries. I don't know if we used the
13 same agent and broker pre and post the
14 acquisition?

15 Q. Okay. And would you please tell
16 me where most of your sales of Mueller's
17 pasta were made during the term you were at
18 AIPC from 1997, I believe, until 2005?

19 A. Where they were made, meaning
20 geography?

21 Q. Where they were sold primarily.

22 A. Where they were sold by geography?

23 Q. By geography.

24 A. Would have been through grocery
25 stores in the eastern half of the United

1 States would have been the majority of those
2 sales.

3 Q. And that's the Mueller land?

4 A. Mueller land.

5 Q. And at any time did you make a
6 significant effort as the president of the
7 company and CEO to expand that geographic
8 location to Alaska?

9 A. No.

10 Q. To Hawaii?

11 A. No.

12 Q. California?

13 A. No.

14 Q. Just east of the Mississippi is
15 where your focus was primarily?

16 A. Primarily.

17 Q. Today you don't recall what the
18 allocation of the value of the Mueller
19 trademark was as compared to the total value
20 of the purchase of the business?

21 A. No, sir.

22 Q. Was there ever a time when AIPC's
23 management reviewed the issue of dropping the
24 slogan "America's Favorite Pasta" following
25 your purchase of that Mueller's brand from

1 Best Foods?

2 A. Yes, it was discussed.

3 Q. And when was that discussed,
4 approximately?

5 A. Each time the brand was updated in
6 terms of look and packaging, that topic would
7 have been discussed.

8 In particular, I recall it as part
9 of the redesign following the Mueller's Pasta
10 La Bella imported pasta experiment of roughly
11 2002 and, similarly, as part of a redesign
12 project that was completed in 2005.

13 Q. Getting back to 2002, the La Bella
14 experiment, do you recall the difference in
15 the scale of the effort?

16 You had core brand over here with
17 "America's Favorite Pasta," Mueller's
18 "America's Favorite Pasta," and then you had
19 this experiment.

20 Was the experiment going in the
21 Italian stuff five percent of your gross
22 production or 50 percent of your gross
23 production of pasta?

24 MR. VAN HOOZER: Mr. Banner, just
25 for clarification, could you identify whether

1 you're talking about AIPC as a whole
2 production or--

3 Q. (By Mr. Banner) Just my
4 understanding was Mueller's La Bella, and
5 Mueller's not-La Bella?

6 MR. VAN HOOZER: Right.

7 THE WITNESS: America's favorite.

8 Q. (By Mr. Banner) And that's what
9 I'm trying to determine, not AIPC because I
10 know they had other brands in other places.
11 But what I'm trying to figure out is what
12 was the percentage? Was it--

13 A. The majority of the product,
14 roughly two-thirds, would have been the core.

15 Q. So one-third was committed to this
16 one-year effort?

17 A. (Witness nodded head up and down.)

18 Q. Okay. In total, how much during
19 the year 2000 did -- I think this might be
20 in the schedule and I don't recall this
21 because I've seen a lot of new stuff today
22 -- What percentage of all the pasta that AIPC
23 made in 2000 after it acquired the Mueller's
24 brand and the Borden's stuff, what percentage
25 of the production was directed to sales

1 through the Mueller's brand as compared to
2 all the other brands that AIPC had?

3 A. I don't have that information off
4 the top of my head.

5 Q. Okay. Can you give me -- was
6 Mueller's brand the principle brand of AIPC
7 in 2000?

8 A. It was certainly the largest brand
9 and the majority of our branded business in
10 2000.

11 Q. Was it the majority of your
12 branded business every year through 2005?

13 A. I'd also like to see the data. I
14 don't want to try to do that just from vague
15 recollection.

16 It was always the largest brand by
17 a significant measure during my time where we
18 were in the branded business.

19 Q. Okay. To your knowledge, was the
20 slogan "America's Favorite Pasta" ever used on
21 any packaging without the Mueller's name?

22 A. Not that I know of.

23 Q. When you left La Bella when you
24 ended that in, I believe you said, late
25 2002--

1 A. I think that's correct.

2 MR. VAN HOOZER: I just want to
3 make sure -- they've not let Pasta La Bella,
4 they've let Mueller's Pasta La Bella.

5 Q. (By Mr. Banner) Mueller's Pasta
6 La Bella. When you left that experiment with
7 the green and white and red packaging, that
8 product line, those cuts you said, they all
9 returned to the blue, red, and white
10 packaging of Mueller's?

11 A. I'd like to clarify two things you
12 said. The color coding of green and pumpkin
13 and the like was done by Best foods.

14 Q. Okay.

15 A. The Mueller's Pasta La Bella was
16 taking the subset of the brand--

17 Q. Yeah.

18 A. --into blue boxes and vertical bags
19 that said "Mueller's Pasta La Bella" and they
20 were in the white -- the predominant white
21 became predominantly blue.

22 Q. Okay. So it was never green?

23 A. No.

24 Q. Okay.

25 A. If this schedule were in color,

1 Exhibit 105, these packages are blue.
2 (indicated), these are white (indicated). So
3 we took this percentage of the items which is
4 not volume indicative--

5 Q. Yeah.

6 A. --because they were the slower
7 sellers, but this group of items were moved
8 to blue and then roughly a year later the
9 whole thing returned to white.

10 Q. Thank you. And will you tell me
11 what triggered the re-launch of the Mueller's
12 brand in 2002, for my recollection?

13 A. Poor sales results of the things
14 that were moved into the blue packaging and
15 supplemented by consumer research who said,
16 Mueller's is white, Mueller's is "America's
17 Favorite Pasta."

18 Q. What does "favorite" mean to you?
19 What do you believe "favorite" means to
20 consumers, just the word "favorite"?

21 A. Preferred.

22 Q. What do you believe consumers
23 perceive as the word "favorite" meaning
24 "America's favorite"?

25 A. Also preferred.

1 Q. Did you arrive at this through all
2 of the litigation that's gone on or--

3 A. No, I think we concluded that it
4 was a marketing slogan. It was not a
5 specific factual claim.

6 It was, as supported by the
7 findings of the Court, marketing puffery.

8 For instance, my favorite bottle of
9 wine is Silver Oak and it is my preferred
10 bottle of wine to drink.

11 Q. You have good taste.

12 On the packaging that you created
13 for the Mueller's brand, you used the phrase,
14 "Taste why Mueller's is America's Favorite
15 Pasta." Do you recall that?

16 A. Not specifically.

17 Q. Will you take a look at Exhibits
18 106 through 111?

19 A. Okay.

20 Q. 106 is the Best Foods packaging.
21 Do you see in the small print the very last
22 line, the sentence, "Taste why Mueller's is
23 America's Favorite Pasta"?

24 MR. VAN HOOZER: May I take a
25 brief recess? I'll go get one of the boxes

1 that's a little more legible.

2 MR. BANNER: Please.

3 MR. VAN HOOZER: I don't want
4 anybody to have eye strain over that.

5 MR. BANNER: No, I agree.

6 (A break was taken.)

7 (The parties returned to the
8 deposition and the following proceedings were
9 had:)

10 MR. VAN HOOZER: I brought two
11 boxes. I didn't know which you were
12 referring to, which I'll give you both of
13 them and you can pick the language.

14 MR. BANNER: Okay. Thank you.

15 Q. (By Mr. Banner) First, we'll use
16 the CPC copyright 1998 box I hand to you.

17 And I believe that that would be
18 representative of all their packaging. Would
19 you agree with me?

20 A. No disagreement. No basis for
21 disagree-ment.

22 Q. And under the backside of the box
23 you see the prominent display of Mueller's
24 trademark, the "R" in the circle?

25 A. Um-hum.

1 Q. And then the very last sentence on
2 that box, could you read it?

3 A. "Taste why Mueller's is America's
4 Favorite Pasta."

5 Q. Okay. And then we move to --
6 While you're looking at the back, does it
7 have a claim on the left-hand side at the
8 bottom regarding the ownership of the brand
9 Mueller's? Should be at the bottom left.

10 A. Yes.

11 Q. Could you read that?

12 A. "Mueller's is a registered
13 trademark of CPC, International."

14 Q. Thank you.

15 A. "C-1998, CPC, International, Inc."

16 Q. I'm going to hand you the 2002
17 copyrighted AIPC packaging from Mueller's.

18 Would you direct your attention to
19 the back of the box and indicate whether you
20 see a similar write-up in the last sentence
21 at the top portion under the brand Mueller's?

22 A. Yes.

23 Q. Would you read that, please?

24 A. "Taste why Mueller's is America's
25 Favorite Pasta."

1 Q. Thank you. Why was that phrase
2 used on the packaging by Best Foods and by
3 AIPC?

4 A. It's part of what we called
5 romance language. It is over recipes that
6 encourage the consumers of how to prepare our
7 product and it was probably to get them to
8 eat it.

9 Q. Yes. And you have to buy it to
10 eat it.

11 Would it be fair, to your
12 knowledge, as the president and CEO of AIPC,
13 did that phrase continue to be on the
14 packaging until the time you left?

15 A. I don't have specific recall of --
16 I would need to refer to packaging.

17 Q. Okay.

18 MR. BANNER: Can we go off the
19 record a minute?

20 MR. VAN HOOZER: Yes.

21 (A discussion was held off the
22 record.)

23 (A break was taken.)

24 (The parties returned to the
25 deposition and the following proceedings were

1 had:)

2 Q. (By Mr. Banner) I'm going to hand
3 you Exhibit 4 and ask you to look at the
4 back of the box and tell me if there is a
5 claim of ownership of the Mueller's mark on
6 there?

7 A. Yes.

8 Q. Would you read it for the court
9 reporter?

10 A. "Distributed by American Italian
11 Pasta Company, Kansas City, Missouri, 64116,
12 Mueller's is a registered trademark of the
13 American Italian Pasta Company, C-2005."

14 Q. And do you find on the back of
15 the box the sentence that we were previously
16 discussing about, "Taste why Mueller's is
17 America's Favorite Pasta"?

18 A. No.

19 Q. And does that represent the new
20 packaging that was introduced in 2005 that
21 you talked about, the re-packaging?

22 A. Yes.

23 Q. And on the front of the box of
24 Exhibit 4, you see the words, "America's
25 Favorite Pasta" in blue lettering, I believe?

1 A. Red lettering.

2 Q. Red lettering and what size
3 lettering is that in comparison to the brand
4 "Mueller's"?

5 A. It is smaller.

6 Q. Okay. And is there on that box
7 the letters "TM" next to the slogan
8 "America's Favorite Pasta"?

9 A. No.

10 Q. And is there a statement anywhere
11 on that box that "America's Favorite Pasta"
12 is a trademark of Mueller's?

13 A. No.

14 Q. Okay. Thank you.

15 Would you please take a look at
16 Exhibits 54 and 47, Micro Quick is 47 and
17 Pasta Quick is 54, previously introduced?

18 A. (Witness complied.)

19 Q. I'm directing your attention,
20 first, to Exhibit 47.

21 Looking at the -- that's a picture
22 of the front of the packaging and across the
23 front below the trademark Mueller's you'll
24 find, Micro Quick. Do you see that there?

25 A. Yes.

1 Q. Is there any symbol behind the
2 words "Micro Quick"?

3 A. Yes.

4 Q. What are those symbols?

5 A. "TM."

6 Q. What does that mean to you?

7 A. I assume it means it's been
8 trademarked, registered as a trademark.

9 Q. Directing your attention to Exhibit
10 54, the Pasta Quick, do you find on the face
11 of that packaging the words "Pasta Quick"?

12 A. Yes.

13 Q. Do you see any symbol following
14 that?

15 A. Yes, but I can't make it out.

16 MR. BANNER: Have we got a clearer
17 copy of 54?

18 MR. VAN HOOZER: I don't think so.
19 I think that's a copy of a copy. Do you
20 have one, Katie?

21 MS. KATIE GRAY: I don't think so.

22 Q. (By Mr. Banner) Refresh my
23 recollection, you graduated from Drake in what
24 year?

25 A. 1983.

1 Q. And your degree was in?

2 A. Accounting.

3 Q. Accounting. Is that within the
4 business college?

5 A. Yes.

6 Q. Was it a bachelor's of science in
7 business--

8 A. Yes.

9 Q. --majoring in accounting? Okay.

10 To your knowledge, during the years
11 you were president and chief executive officer
12 of AIPC, did AIPC when it used "America's
13 Favorite Pasta" ever use the "TM" or the "R"
14 next to that phrase to indicate that it was
15 claimed as a trademark of "America's Favorite
16 Pasta "?

17 A. I don't know that it was. I have
18 no knowledge of that being done.

19 Q. To your knowledge, can you explain
20 why it might not have been done, as chief
21 executive officer?

22 A. My presumption was that as part of
23 the trade dress and as part of the widely
24 recognized continuously used image of the
25 brand that it was protected through use and

1 -- as part of the trade dress of the
2 Mueller's brand.

3 Q. Okay. And you've seen today
4 several different renditions of the trade
5 dress of Mueller's brand pasta, haven't you?

6 A. (No response.)

7 Q. Over the course of your being at
8 AIPC, would it be fair to say that the trade
9 dress with regard to the presentation of the
10 brand Mueller's has changed more than twice?

11 A. I think I described it as
12 evolutionary.

13 Q. Yes. How quick is the evolution?
14 I mean is it glacial or is it annual?

15 A. By recollection of my time there,
16 every couple of years there was some
17 refinement or evolution of the packaging.

18 Q. Okay.

19 MR. BANNER: I believe the 2002
20 material you brought in, Tom, those exhibits,
21 do we have those still, those boxes?

22 MR. VAN HOOZER: I think those
23 correspond to 1 through 40, if that's easier
24 to refer to the exhibits already marked.

25 Q. (By Mr. Banner) With regard to

1 Exhibits 1 through 40, do you see the -- I
2 believe you'll see on those exhibits -- what
3 is the brand at the top of those exhibits?
4 What is at the top of the first exhibit,
5 Exhibits 10 through 40? Yes, that one.
6 What's right above "Mueller's"?

7 A. "America's Favorite Pasta."

8 Q. And is it linked with anything?

9 A. To me, it's linked with the
10 Mueller's brand name and the overall -- this
11 rectangular area which the brand marketers
12 refer to as the medallion or something of the
13 Mueller's brand.

14 Q. Does it have the flag or the
15 pennant above it?

16 A. Yes, sir.

17 Q. And referring to Exhibit 4 on the
18 table here, at the front of that, is the
19 flag on that box the current packaging?

20 A. There is no flag on Exhibit 4.

21 Q. Do you know -- Today, do you know
22 when the flag design probably was taken off
23 the packaging?

24 A. It's my understanding that it
25 happened as part of the 2005 redesign.

1 Q. Okay. I direct your attention,
2 please, now, to Exhibits 85 and 86, which are
3 the trademark applications which you authorizes
4 and filed in 2003..

5 Could you tell me which of those
6 -- which is for the word mark "America's
7 Favorite Pasta"? Or are they both for
8 "America's Favorite Pasta" word mark?

9 A. (No response.)

10 Q. If you will look at the drawing,
11 packaging, you will find it.

12 A. Okay.

13 Q. Is Exhibit 85 for the word mark of
14 "America's Favorite Pasta"?

15 A. It appears so, yes.

16 Q. Okay. And that's for the word
17 mark. And Exhibit 86 is for the one with
18 the flag mark?

19 A. Yes, that's the way it appears to
20 me.

21 Q. In your experience at AIPC, if a
22 design changes on the packaging, is it likely
23 that you will continue to attempt to register
24 the mark?

25 A. I have no blanket opinion about

1 that. Case by case.

2 Q. Okay. One of the last questions
3 Tom asked you today is the approximate number
4 of packages during your tenure at AIPC with
5 Mueller's and the slogan, you indicated
6 hundreds of millions to a billion packages?

7 A. Yes, sir.

8 Q. And then it would be if that was
9 the largest percentage of your business, it
10 would be fair to say that of all of the
11 brands that AIPC has manufactured during your
12 tenure, you would think that there's probably
13 two billion packages of pasta sold under all
14 of the brands during your tenure?

15 A. More.

16 Q. More than two billion?

17 A. (Witness nodded head up and down.)

18 Q. Okay. That's a lot of pasta.

19 A. Yes, sir.

20 Q. Well, you asked--

21 MR. BANNER: I have no further
22 questions at this time. Thank you.

23 THE WITNESS: Thank you.

24 MR. VAN HOOZER: Just a question
25 or two on redirect.

1 REDIRECT EXAMINATION

2 BY-MR.VAN-HOOZER:

3 Q. Mr. Webster, I'm going to show you
4 what's been previously marked Exhibit 78. Is
5 this something that you've seen before?

6 A. Yes, sir.

7 Q. How would you regard Barilla during
8 the time that you were president of AIPC? How
9 would you regard Barilla in comparison to the
10 Mueller's brand?

11 A. As a company or as a brand?

12 Q. As a brand.

13 A. As a brand, we identified Barilla
14 as the essence of authentic Italian pasta.

15 Q. And as a company, how did you
16 regard them, vis-a-vis AIPC?

17 A. A fierce and highly competent
18 competitor.

19 Q. Was it your occasion, then, to
20 monitor their packaging from time to time?

21 A. Yes.

22 Q. Okay . In terms of the Mueller's
23 flag style packaging, who did you wish to
24 distinguish yourself from?

25 A. It was an important part of

1 differentiating ourselves from Barilla.

2 Their packaging says, "Italy's No.
3 1 Pasta" prominently displayed. It moved
4 around some, but periodically -- normally,
5 just above or just below the Barilla
6 branding. And it was, in our mind, an
7 integral part of their identity.

8 As I mentioned in earlier
9 testimony, even though the product came from
10 Iowa, we thought the packaging implied that
11 it came from Italy and that it was "Italy's
12 No. 1 Pasta."

13 Q. Do you see any indication of
14 trademark protection in association with the
15 slogan " Italy's No. 1 Pasta"?

16 A. It doesn't appear to have a "TM"
17 or an "R."

18 MR. VAN HOOZER: That concludes my
19 questions.

20 THE COURT REPORTER: Okay. On
21 copies, did you want -- you'll get the full
22 size original. Did you want a mini for your
23 copy?

24 MR. VAN HOOZER: No, I think just
25 a full size original will be fine.

1 MS. KATIE GRAY: Could we have an
2 e-tran?

3 THE COURT REPORTER: Well, you'll
4 get an original and a copy anyway.

5 MR. VAN HOOZER: Let her tell me
6 what I want.

7 MS. KATIE GRAY: An e-tran with
8 the original and then we'll deal with the--

9 THE COURT REPORTER: You don't
10 need a mini?

11 MS. KATIE GRAY: No.

12 THE COURT REPORTER: Because you'll
13 get an original and a copy. You'll get
14 both.

15 Do you want the mini copy, then,
16 for the copy or the full size?

17 MS. KATIE GRAY: Two full size.

18 MR. VAN HOOZER: And what we have
19 to do, there are certain particular signature
20 requirements that you're aware of, so we will
21 get that to you fairly expeditiously and you
22 guys can talk to her.

23 THE COURT REPORTER: I forgot what
24 you wanted before. Did you want a mini
25 copy?

1 MR. BANNER: Same thing as him.

2 MR. BANNER: Yeah. No extra cost?

3 THE REPORTER: No. What do you
4 need for your copy?

5 MR. JAVILLONAR: I don't think I
6 need one, but could I get your card?

7 THE COURT REPORTER: Sure.

8 MS. KATIE GRAY: And we're going
9 to keep the exhibits. We're going to retain
10 the exhibits and scan them on a disk.

11 (The proceedings concluded at 12:13
12 p.m.)

13 (Witness excused.)

14 THE COURT REPORTER: Okay. A full
15 size copy and an e-tran?

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Timothy Scott Webster

DESCRIPTION OF EXHIBITS

	<u>EXHIBIT</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
1			
2			
3			
4	98	Notice to Take Deposition	4
5	99	Subpoena	4
6	100	Manufacturing and Distribution	9
7		Agreement between CPC and AIPC	
8	101	Letter from Tim Webster to	14
9		Tom Berkle dated 9-11-1997	
10	102	Contract for purchase	21
11	103	Document reflecting sales of	24
12		Mueller's pasta prior to	
13		acquisition by AIPC	
14	104	Document reflecting sales of	24
15		Mueller's pasta prior to	
16		acquisition by AIPC	
17	105	Joint presentation of	29
18		prototype of how products would	
19		be merchandised on shelf	
20	106-111	One-pound boxes of Mueller's	30/31
21		spaghetti in slightly	
22		evolutionary packaging	
23	112	Television advertising spending	39
24		being tracked	
25	113	Magazine Print Ad	39

DESCRIPTION OF EXHIBITS (CONT.)

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<u>EXHIBIT</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
114	Magazine Print Ad	39
	Exhibits (not attached)	
	(Exhibits retained by Mr. Tom Van Hoozer at Hovey Williams Law Firm.)	

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CERTIFICATE OF REPORTER

STATE OF MISSOURI)

) ss.

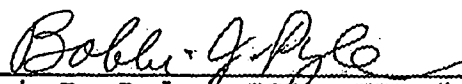
COUNTY OF BUCHANAN)

I, Bobbi J. Pyle, Certified Court Reporter within and for the State of Missouri, appointed to take the deposition of TIMOTHY SCOTT WEBSTER, in the matter of American Italian Pasta Company vs. Barilla G. E. R. FRATELLI-SOCIETA PER AZIONI, Opposition No. 91-161,373, certify that the above-named witness appeared before me on November 9, 2006, at 10:00 a.m. at the law offices of Hovey Williams, LLP, 2405 Grand Boulevard, Suite 400, Kansas City, Missouri, and before the deposition said witness was duly sworn by me to testify to the truth; that the said deposition was taken by me in stenographic shorthand; then reduced to typewritten form herein; that the foregoing is a true and accurate transcription of the questions asked, testimony given and proceedings had, to the best of my knowledge and belief.

1
2 Attorney for the Adverse Party was
3 present, and officer was not disqualified as
4 specified in Rule 28 of the Federal Rules of
5 Civil Procedure.

6 I further certify that I am not
7 related to any party herein or their counsel,
8 that I am not clerk or stenographer of either
9 party or of the attorney of either party, and
10 have no interest in the result of this
11 litigation.

12 IN WITNESS WHEREOF, I have hereunto
13 set my hand this 20th day of November, 2006.
14

15
16 
Bobbi J. Pyle, CSR, CCR #434

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CAPTION

The Deposition of Timothy Scott Webster, taken in the matter, on the date, and at the time and place set out on the title page hereof.

It was requested that the deposition be taken by the reporter and that same be reduced to typewritten form.

It was agreed by and between counsel and the parties that the Deponent will read and sign the transcript of said deposition.

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CERTIFICATE

STATE OF

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COUNTY/CITY OF

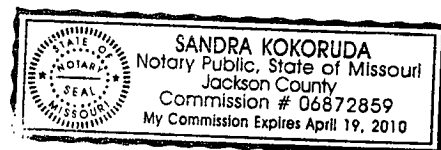
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Before me, this day, personally appeared, Timothy Scott Webster, who, being duly sworn, states that the foregoing transcript of his/her Deposition, taken in the matter, on the date, and at the time and place set out on the title page hereof, constitutes a true and accurate transcript of said deposition.

Timothy Scott Webster
Timothy Scott Webster

SUBSCRIBED and SWORN to before me this 28th day of November, 2006 in the jurisdiction aforesaid.

Sandra Kokoruda
My Commission Expires Notary Public



DEPOSITION ERRATA SHEET

RE: SetDepo, Inc.

File No. 11712

Case Caption: American Italian Pasta Co. Vs.
Barilla G. E. R. FRATELLI-SOCIETA PER AZIONI

Deponent: Timothy Scott Webster

Deposition Date: November 9, 2006

To the Reporter:

I have read the entire transcript of my
Deposition taken in the captioned matter or
the same has been read to me. I request
that the following changes be entered upon
the record for the reasons indicated. I
have signed my name to the Errata Sheet and
the appropriate Certificate and authorize you
to attach both to the original transcript.

Page No. 48 Line No. 21¹²³ Change to: Asset Purchase
versus Acid (several occurrences through page 51)

Reason for change: Error

Page No. 40 Line No. 6 Change to: Price from Print

1

2

Reason for change:

3

Page No. 51 Line No. 6/7 Change to:
Asset not Acid

4

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Reason for change:

6

Page No. Line No. Change to:

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Reason for change:

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Page No. Line No. Change to:

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Reason for change:

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Deposition of Timothy Scott Webster

13

14

Page No. Line No. Change to:

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1 Page No. Line No. Change to:

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6 Reason for change:

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SIGNATURE: Timothy Scott Webster DATE: 11-28-06

10

Timothy Scott Webster

Redacted—Exhibit 100

Redacted—Exhibit 102

Redacted—Exhibit 103

Redacted—Exhibit 104